

# Avoiding *A Civil Action*:<sup>1</sup> Mandatory Summary Jury Trial in the Settlement of Products Liability Design Defect Cases in Light of the *Restatement (Third) of Torts*

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## I. INTRODUCTION

Settlement negotiations are often frustrated in products liability cases, as in all tort actions, where the decision to try the case is "based on the client's psychological need for retribution, vindication or justice."<sup>2</sup> High-cost litigation and complete discovery, "rather than settlement and [alternative dispute resolution], characterize these cases where deterrence is a primary concern: plaintiffs seek deterrence of poor products . . . among other goals; defendants seek deterrence of repetitive suits regarding the same product. The result: full-tilt litigation."<sup>3</sup>

Moreover, settlement negotiations are often frustrated in design defect cases because a stigma attaches to the party who first suggests settlement.<sup>4</sup> This stigma attaches based on a perceived fear of trial or case weakness or an impression of selling out one's case.<sup>5</sup> Moreover, because discovery basically must be completed before liability can be established in design

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<sup>1</sup> See generally *A CIVIL ACTION* (Touchstone Pictures 1998). This film was based on the national bestseller by Jonathan Harr. See generally JONATHAN HARR, *A CIVIL ACTION* (1995).

<sup>2</sup> RICHARD J. HEAFEY & DON M. KENNEDY, *PRODUCT LIABILITY: WINNING STRATEGIES AND TECHNIQUES* § 13.02 (1996). This point is well illustrated in the recent motion picture *A Civil Action*. See generally *A CIVIL ACTION*, *supra* note 1. *A Civil Action* is based on the true story of attorney Jan Schlichtmann who represented a neighborhood of families in Woburn, Massachusetts. The families claimed that several manufacturing plants in the area were dumping toxins in the local drinking water supply, causing several members in the community to develop cancer. Schlichtmann rejected numerous attempts by opposing counsel to settle, insisting a full trial would bring a more favorable outcome for his clients. Ultimately, the jury returned a verdict for the defendant. The loss from this trial and the failure to accept the defendant's lucrative settlement offer forced Schlichtmann and his law firm into bankruptcy. See *id.*

<sup>3</sup> CPR INST. FOR DISPUTE RESOLUTION, ADR COST SAVINGS AND BENEFIT STUDIES I-73 (1994).

<sup>4</sup> See HEAFEY & KENNEDY, *supra* note 2, § 13.05.

<sup>5</sup> See *id.*

defect cases, settlement prior to discovery is unlikely because the plaintiff has little bargaining power.<sup>6</sup>

Stated above are some of the reasons why the parties do not voluntarily implement alternative dispute resolution (ADR)<sup>7</sup> techniques in an attempt to settle products liability cases.<sup>8</sup> However, "mandatory," or court-ordered, ADR may be very useful in products liability cases because the court "rather than a party first suggests settlement."<sup>9</sup>

This Note asserts that federal courts should use the mandatory summary jury trial (SJT)<sup>10</sup> to promote the settlement of design defect cases<sup>11</sup> bound for trial. While there has been approval of the use of the SJT to promote the settlement of products liability cases generally,<sup>12</sup> the specific use of SJTs in the settlement of design defect<sup>13</sup> cases has not been explored to date. The exploration of using the SJT with design defect cases is especially timely in light of the 1998 *Restatement (Third) of Torts*. Various

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<sup>6</sup> See *infra* Part II.C.

<sup>7</sup> Generally defined, ADR is anything short of "full-tilt litigation" on the merits. ELIZABETH PLAPINGER ET AL., CENTER FOR PUB. RESOURCES, JUDGE'S DESKBOOK ON COURT ADR (Elizabeth Plapinger et al. eds., 1993), reprinted in part in Elizabeth Plapinger et al., Center for Pub. Resources, *Judge's Deskbook on Court ADR*, 12 ALTERNATIVES TO HIGH COST LITIG. 9, 9 (1994). Major court ADR processes include mediation, arbitration, early neutral evaluation, and summary jury trial. See *id.*, reprinted in part in Elizabeth Plapinger et al., Center for Pub. Resources, *Judge's Deskbook on Court ADR*, 12 ALTERNATIVES TO HIGH COST LITIG. 9, 9-15 (1994).

<sup>8</sup> See HEAFEY & KENNEDY, *supra* note 2, § 13.05. "The schizophrenia of simultaneously litigating a lawsuit and attempting to negotiate a settlement may result in a reluctance to take what appears to be a 'vulnerable' or 'soft' position." *Id.* (citing Curtis H. Barnette, *The Importance of Alternative Dispute Resolution: Reducing Litigation Costs as a Corporate Objective*, 53 ANTITRUST L.J. 277, 279 (1984)).

<sup>9</sup> HEAFEY & KENNEDY, *supra* note 2, § 13.02. This is the primary reason "mandatory," or court-ordered summary jury trial (SJT) is recommended in this Note.

<sup>10</sup> This Note focuses on the federal use of mandatory SJTs because federal courts have the authority to implement SJTs. See *infra* Part III.A. However, where state courts have the authority, they should also implement SJTs to promote the settlement of design defect cases.

<sup>11</sup> Although arising under state law, design defect claims can be pursued in federal court where there is diversity of citizenship between the opposing parties and the claim meets the amount in controversy requirements. See 28 U.S.C. § 1332 (1994).

<sup>12</sup> See THOMAS D. LAMBROS, THE SUMMARY JURY TRIAL AND OTHER ALTERNATIVE METHODS OF DISPUTE RESOLUTION 16 (1984).

<sup>13</sup> Design defect claims are one of three types of product defect claims in products liability law. See *infra* note 14. For the definition of a design defect as opposed to a manufacturing defect or a warning defect, see *infra* notes 14-17.

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characteristics of products liability law under the *Restatement (Third)* make the SJT an excellent tool to promote the settlement of design defect cases.

In order to understand why SJT is an appropriate settlement technique in design defect cases, the standards of liability under the *Restatement (Third)* and characteristics of design defect cases must be discussed. Part II of this Note describes liability standards for design defect cases. Part II also provides a summation of the characteristics of design defect cases. Part III explains the creation, development, advantages, and disadvantages of SJTs. Part IV explains the characteristics of design defect cases that make them well suited for SJTs. Part IV also suggests recommendations for the SJT procedure in design defect cases. Part V of this Note concludes that the mandatory SJT should be used to promote the settlement of design defect cases bound for trial.

### II. LIABILITY STANDARDS FOR DESIGN DEFECT CASES

A significant change in products liability law from the *Restatement (Second) of Torts* made by the *Restatement (Third) of Torts* was the division of product defect cases into three categories<sup>14</sup>—manufacturing defects,<sup>15</sup> design defects,<sup>16</sup> and warning defects.<sup>17</sup> These three categories were

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<sup>14</sup> The *Restatement (Third) of Torts: Products Liability* provides: "A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings." *RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY* § 2 (1998).

<sup>15</sup> A manufacturing defect is described as follows: "A product . . . contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product." *Id.* § 2(a).

<sup>16</sup> The *Restatement (Third)* describes a design defect as follows:

A product:

....

is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

*Id.* § 2(b) (emphasis added). The focus of this Note is on design defect cases, which, one study found, comprised 75% of all products liability claims in excess of \$100,000 where the main theory of liability was strict liability. See W. PAGE KEETON ET AL., *PRODUCTS LIABILITY AND SAFETY—CASES AND MATERIALS* 23–24 (2d ed. 1989).

created in order to retain strict liability for manufacturing defects, but apply negligence to design and warning defects.<sup>18</sup> Subpart A of this Part describes the major changes in the *Restatement (Third)*. Changes in the *Restatement (Third)* that will be discussed below and favor the use of SJT include the following: (1) the shift from a strict liability standard for plaintiffs to a negligence standard and (2) requiring proof of a reasonable alternative design under the design defect risk-utility test. Subpart B of this Part discusses an alternative to the *Restatement (Third)* liability standard—the consumer expectation test; this standard also has characteristics that favor settlement with the SJT. Furthermore, both subpart A and subpart B of this Part examine the discovery strategies necessary to obtain evidence sufficient to establish liability under the *Restatement (Third)*'s risk-utility test and the consumer expectations test. Finally, subpart C of this Part provides a summation of the characteristics of design defect cases.

#### A. *The Restatement (Third) of Torts: Shifting from Strict Liability to Negligence and Requiring Proof of a Reasonable Alternative Design Under the Risk-Utility Test*

There are two primary reasons why the *Restatement (Third)* approach makes design defect cases well suited for the SJT. First, as a result of the shift from strict liability to negligence and the requirement that a safer alternative design exist, the key issues involved are decided by the jury.<sup>19</sup>

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<sup>17</sup> A warning defect is described as follows:

A product:

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is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) (1998).

<sup>18</sup> See *id.* § 1 cmt. a; see also § 1 reporter's note on cmt. a (recognizing abundant case law authority for dividing product defects into three categories and applying a different liability standard depending on the type of defect involved). But see Frank J. Vandall, *The Restatement (Third) of Torts, Products Liability, Section 2(b): Design Defect*, 68 TEMP. L. REV. 167, 176-79 (1995) (arguing that the distinction between manufacturing defects and design defects is difficult to make in practice and is not uniformly supported by the case law).

<sup>19</sup> See *infra* Part IV.A.

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Second, under the *Restatement (Third)* risk-utility test, discovery must be completed to obtain evidence sufficient to establish liability; thus, design defect cases are in a posture ready for trial.<sup>20</sup>

### 1. *Shifting from Strict Liability to Negligence*

Beginning in the mid-1960s, the *Restatement (Second) of Torts*<sup>21</sup> established that defective product cases were to be determined by a strict liability standard.<sup>22</sup> *Greenman v. Yuba Power Products, Inc.*,<sup>23</sup> which held that “[a] manufacturer is strictly liable in tort when an article he places on the market . . . proves to have a defect that causes injury to a human being,”<sup>24</sup> drove the *Restatement (Second)*. The *Greenman* case influenced the approach of section 402A of the *Restatement (Second) of Torts*,<sup>25</sup> which applied strict liability in *all* defective product cases. However, one of the problems courts have struggled with under the section 402A approach has been the application of strict liability to *all* defective products cases.<sup>26</sup>

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<sup>20</sup> See *id.*

<sup>21</sup> The text of the *Restatement (Second) of Torts* provided as follows:

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

<sup>22</sup> Section 402A’s concept of strict liability in product defect cases was widely accepted by courts across the United States in the 1960s. See David G. Owen, *Defectiveness Restated: Exploding the “Strict” Products Liability Myth*, 1996 U. ILL. L. REV. 743, 744 (1996).

<sup>23</sup> 377 P.2d 897 (Cal. 1962).

<sup>24</sup> *Id.* at 900.

<sup>25</sup> See David Owen, *Products Liability Law Restated*, 49 S.C. L. REV. 273, 277–78 (1998).

<sup>26</sup> Section 402A applied strict liability to defective product cases as a whole and did not distinguish between manufacturing defects, design defects, and warning defects. See Owen, *supra* note 22, at 748–49.

The *Restatement (Third) of Torts* replaced section 402A in 1998. As mentioned above, this replacement resulted in the following three functional categories for product defect cases: manufacturing defects, design defects, and warning defects.<sup>27</sup> Additionally, after thirty years of strict liability under section 402A, a negligence standard has officially been applied to design and warning defect cases.<sup>28</sup> This approach by the *Restatement (Third)* expressly applying negligence to design defect cases is consistent with what the majority of courts have been doing but not saying.<sup>29</sup> "It has been an open secret for many years that courts have been purporting to apply 'strict' liability doctrine to design . . . cases while in fact applying principles that look remarkably like negligence."<sup>30</sup> However, courts today are still struggling to make sense out of section 402A's application of strict liability in all defective product cases.<sup>31</sup> Therefore, the *Restatement (Third)* serves to reduce the confusion by promoting the expressly stated application of negligence to design defect cases across the United States.<sup>32</sup>

## 2. Requiring Proof of a Reasonable Alternative Design Under the Restatement (Third) of Torts' Risk-Utility Test

It is evident that the majority of jurisdictions in the United States apply a risk-utility test in design defect cases.<sup>33</sup> Under the risk-utility analysis, a

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<sup>27</sup> See *supra* notes 15–17 (quoting the *Restatement (Third)*'s definitions of manufacturing defect, design defect, and warning defect).

<sup>28</sup> See RESTATEMENT (THIRD) OF TORTS § 2 cmt. a (1998) ("Subsections (b) and (c), which impose liability for products that are defectively designed or sold without adequate warnings or instructions and are thus not reasonably safe, achieve the same general objectives as does liability predicated on negligence."); see also *id.* § 1 cmt. a ("Sections 2(b) and 2(c) [dealing with design and warning defects] rely on a reasonableness test traditionally used in determining whether an actor has been negligent."). The *Restatement (Third)* retained strict liability for manufacturing defect cases. See *id.* § 2 cmt. a.

<sup>29</sup> See Owen, *supra* note 22, at 748–49.

<sup>30</sup> *Id.* at 749.

<sup>31</sup> See *id.* at 745–46.

<sup>32</sup> Cf. Owen, *supra* note 25, at 292. But see John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402: Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493, 553 (1996) (arguing that the majority of jurisdictions apply strict liability to design defect cases without proof of negligence).

<sup>33</sup> Under the risk-utility test, a product is defective if the risks of the product outweigh its utility. See *Soule v. General Motors Corp.*, 882 P.2d 298, 308 (Cal. 1994)

number of factors are considered to determine whether the risks of a product outweigh its utility.<sup>34</sup> The *Restatement (Third)*'s risk-utility test<sup>35</sup>

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(explaining that a design defect exists only if the inherent dangers of a design outweigh the benefits of the design); *Armentrout v. FMC Corp.*, 842 P.2d 175, 182 (Colo. 1992) (stating that a design is defective if the risk of injury is not outweighed by the benefits of the design; upholding a jury instruction using such a definition); *Banks v. ICI Ams., Inc.*, 450 S.E.2d 671, 673 (Ga. 1994) (indicating that several jurisdictions determine whether a design defect exists by weighing the inherent risk in a product design against the "utility or benefit derived from the product"); *Wagatsuma v. Patch*, 879 P.2d 572, 584 (Haw. Ct. App. 1994) (explaining that a design defect does not exist if the inherent danger in a design is not outweighed by the benefit of the design); *Guiggey v. Bombardier*, 615 A.2d 1169, 1172 (Me. 1992) ("To determine whether a product is defectively dangerous, we balance the danger presented by the product against its utility."); *Haberkorn v. Chrysler Corp.*, 533 N.W.2d 373, 380 (Mich. Ct. App. 1995) (stating that the jury must balance the risk of harm inherent in a design against the design's utility in determining whether there is a design defect); *Sperry-New Holland v. Prestage*, 617 So.2d 248, 254 (Miss. 1993) (holding that a defect in design exists if the danger that a product creates outweighs the utility); *Roberts v. Rich Foods, Inc.*, 654 A.2d 1365, 1371 (N.J. 1995) (stating that the test for determining design defects is whether the risks of a product outweigh the product's utility); *Denny v. Ford Motor Co.*, 662 N.E.2d 730, 735-36 (N.Y. 1995) (explaining that a design defect can be determined by "weighing . . . the product's benefits against its risks" and "weighing . . . the product's dangers against its over-all advantages"); *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379, 384 (Tex. 1995) (explaining that the test for design defects requires weighing the risks involved with the use of a product against utility of the product); see also RESTATEMENT (THIRD) OF TORTS § 2 reporter's note on cmt. d, subparts II.B-II.C (1998). But see *Vandall*, *supra* note 18, at 168-73 (arguing that risk-utility balancing in design defect cases is not supported by a majority of jurisdictions).

<sup>34</sup> The *Restatement (Third)* outlines factors that typically are used in a risk-utility analysis in stating:

A broad range of factors may be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe. The factors include, among others, the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product . . . . The relative advantages and disadvantages of the product as designed and as it alternatively could have been designed may also be considered. Thus, the likely effects of the alternative design on production costs; the effects of the alternative design on product longevity, maintenance, repair, and esthetics; and the range of consumer choice among products are factors that may be taken into account. A plaintiff is not necessarily required to introduce proof on all of these factors; their relevance, and the relevance of other factors, will vary from case to case.

RESTATEMENT (THIRD) OF TORTS § 2 cmt. f (1998).

<sup>35</sup> See *id.* (quoting the factors used in the *Restatement (Third)* risk-utility analysis).

determines whether some reasonable alternative design would have been better than the manufacturer's chosen design.<sup>36</sup> "More specifically, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design . . . rendered the product not reasonably safe."<sup>37</sup> As with the adoption of the negligence standard, the *Restatement (Third) of Torts* will be instrumental in promoting the uniform requirement of proving an alternative design in design defect cases.<sup>38</sup>

From a litigation standpoint, proving an alternative design requires the plaintiff to plan discovery strategically in order to obtain evidence sufficient to establish liability.<sup>39</sup> There are four primary things a plaintiff must do to establish liability under the risk-utility test, which require extensive discovery. First, the plaintiff must prove that the risks created by the product were reasonably foreseeable based on the manufacturer's testing and analysis of the product prior to distribution.<sup>40</sup> Second, the plaintiff must develop a specific product design that would enhance safety in a manner superior to the original product.<sup>41</sup> "In this process the defendant's

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<sup>36</sup> Basically, the jury must determine whether a reasonable person could conclude that a safer alternative design could have been adopted based on the factors listed above. *See supra* note 34.

<sup>37</sup> *Id.* § 2 cmt. d.

<sup>38</sup> *Cf.* Owen, *supra* note 25, at 291-92. The *Restatement (Third)* points out that nearly every jurisdiction requires proof of an alternative design, whether explicitly or implicitly. *See* RESTATEMENT (THIRD) OF TORTS § 2 reporter's note on cmt. d, subpart I (1998). Additionally, the issue that is nearly always litigated in design defect cases is whether the manufacturer could have adopted an alternative design that would have prevented the plaintiff's harm. *See* David G. Owen, *Toward a Proper Test for Design Defectiveness: "Micro-Balancing" Costs and Benefits*, 75 TEX. L. REV. 1661, 1675 n.48 (1997). *But see* Frank J. Vandall, *The American Law Institute Is Dead in the Water*, 26 HOFSTRA L. REV. 801, 802-04 (1998) (arguing that section 2(b) of the *Restatement (Third)* does not apply traditional negligence, but rather "radical negligence," because of the requirement of proving a reasonable alternative design); Vandall, *supra* note 18, at 174-76 (stating that the overwhelming majority of jurisdictions have rejected the requirement of proving a reasonable alternative design); Vargo, *supra* note 32, at 536-37 (same).

<sup>39</sup> *See* Larry S. Stewart, *A New Frontier: Design Defect Cases and the New Restatement*, TRIAL, Nov. 1998, at 20, 24.

<sup>40</sup> *See id.* (citing RESTATEMENT (THIRD) OF TORTS § 2 cmts. m, n (1998)). "Of course a seller bears responsibility to perform reasonable testing prior to marketing a product and to discover risks . . . that such testing would reveal." RESTATEMENT (THIRD) OF TORTS § 2 cmt. n (1998).

<sup>41</sup> *See* Stewart, *supra* note 39, at 24.



internal data should not be overlooked. Often, the defendant has redesigned the product or produced other product models incorporating safer designs, or its employees have criticized the design in question."<sup>42</sup> Thus, depositions of the defendant's product design personnel are very important in determining the existence of a reasonable alternative design.<sup>43</sup> Third, the plaintiff must inquire into the cost of manufacturing the alternative design, although it is not necessary to establish the specific costs and benefits of the alternative design.<sup>44</sup> Fourth, the techniques used to advertise and market the product must be investigated to determine whether the manufacturer created misleading consumer expectations<sup>45</sup> regarding performance or safety of the product.<sup>46</sup>

After all of these factors have been thoroughly investigated in discovery, the plaintiff is ready to pursue the liability issue. The liability issue is whether the manufacturer negligently failed to adopt a safer alternative design that could have served the same purpose as the defective product.<sup>47</sup> As a result, under the risk-utility test, discovery basically must *be completed* in order to obtain evidence sufficient to establish liability.<sup>48</sup>

In addition, qualified expert testimony will suffice in proving the existence of a safer alternative design "if it reasonably supports the conclusion that a reasonable alternative design could have been practically adopted at the time of sale."<sup>49</sup> Moreover, "[i]n many cases, the plaintiff must rely on expert testimony."<sup>50</sup> Overall, under the risk-utility test the plaintiff must expend substantial dollars on discovery to establish liability through the use of experts, and the plaintiff will not be able to establish liability until discovery is basically completed.

<sup>42</sup> *Id.*

<sup>43</sup> See HEAFEY & KENNEDY, *supra* note 2, § 4.04.

<sup>44</sup> See Stewart, *supra* note 39, at 24 (citing RESTATEMENT (THIRD) OF TORTS § 2 cmt. f (1998)).

<sup>45</sup> Consumer expectations cannot be used as an independent basis to establish a defective design under the new *Restatement*. See RESTATEMENT (THIRD) OF TORTS § 2 cmt. g (1998). However, consumer expectations may be considered in determining whether omission of an alternative design renders the product not reasonably safe. See *id.* § 2 cmt. f.

<sup>46</sup> See Stewart, *supra* note 39, at 25 (citing RESTATEMENT (THIRD) OF TORTS § 2 cmts. f, g).

<sup>47</sup> See HEAFEY & KENNEDY, *supra* note 2, § 4.04.

<sup>48</sup> See *id.* (explaining that the plaintiff must perform extensive discovery in order to establish the existence of liability under the risk-utility test).

<sup>49</sup> RESTATEMENT (THIRD) OF TORTS § 2 cmt. f (1998).

<sup>50</sup> *Id.*

### B. *The Consumer Expectations Test*

Although considered a minority view, the non-*Restatement* view, or consumer expectations test, is still used in some jurisdictions.<sup>51</sup> "The consumer expectations test is based on the manufacturer's moral responsibility to tell the truth about the product."<sup>52</sup> When manufacturers fail to do this, consumers may be tricked into thinking a product is safer than it really is because of outrageous advertisement claims.<sup>53</sup>

In terms of litigation in consumer expectations test jurisdictions, plaintiffs should investigate the marketing and advertising materials used by the manufacturer through depositions of marketing personnel and other discovery devices.<sup>54</sup> This type of discovery can uncover situations where the manufacturer misled consumers into believing that a particular product design was safe without actually telling consumers the product was safe.<sup>55</sup> Moreover, this investigation of marketing and advertising is critical "[i]n an era when manufacturers can manipulate consumers into believing that grossly dangerous products will not [cause] harm."<sup>56</sup>

Therefore, as under the risk-utility test, discovery under the consumer expectations test must be substantially completed in order to obtain evidence sufficient to establish liability.<sup>57</sup> The use of expert testimony generally is not required under the consumer expectations test.<sup>58</sup> However, in most cases an expert will assist the jury in determining what the ordinary expectations<sup>59</sup> of a product are when the manufacturer uses advertisements

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<sup>51</sup> See RESTATEMENT (THIRD) OF TORTS § 2 reporter's note on cmt. d (explaining that only six states—Alaska, Arkansas, Hawaii, Nebraska, Oklahoma, and Wisconsin—use the consumer expectations test as an independent test for design defect cases). *But see* Vargo, *supra* note 32, at 591 (listing 10 states that use the consumer expectations test for strict liability design defects). The *Restatement (Third)* does not allow use of the consumer expectations as an independent basis of proving a design defect. *See supra* note 45.

<sup>52</sup> HEAFEY & KENNEDY, *supra* note 2, § 4.03.

<sup>53</sup> *See id.*

<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

<sup>56</sup> Stewart, *supra* note 39, at 22.

<sup>57</sup> *See* HEAFEY & KENNEDY, *supra* note 2, § 4.04 ("[T]he more detailed the evidentiary presentation, the more the jury is likely to perceive the [advertising] 'trick.'").

<sup>58</sup> *See id.*

<sup>59</sup> *See* Morton v. Owens-Corning Fiberglas Corp., 40 Cal. Rptr. 2d 22, 25 (Cal. Ct. App. 1995) ("[E]xpert testimony may be admissible to prove what ordinary

that are difficult to identify as misleading.<sup>60</sup> Thus, products liability claims in jurisdictions using the consumer expectations test are similar to claims in jurisdictions using the risk-utility test in that the plaintiff must substantially complete discovery and use expert witnesses to establish liability.

### *C. Summation of Design Defect Characteristics Under the Liability Standards*

In summation, most courts today are still struggling with the *Restatement (Second)* section 402A application of strict liability in design defect cases.<sup>61</sup> Therefore, most courts apply a negligence standard while calling it strict liability.<sup>62</sup> The *Restatement (Third)* adoption of a specific negligence standard will promote the uniform application of negligence in design defect cases.<sup>63</sup> Likewise, by explicitly requiring proof of a reasonable alternative design, the *Restatement (Third)* will promote the uniform application of this standard in design defect cases.<sup>64</sup>

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consumers of the products actually expect when those expectations are beyond the lay experience . . . [of] jurors.”).

<sup>60</sup> See HEAFEY & KENNEDY, *supra* note 2, § 4.03 n.6 (citing U.S. DEP’T OF HEALTH & HUMAN SERVS., PREVENTING TOBACCO USE AMONG YOUNG PEOPLE: A REPORT OF THE SURGEON GENERAL (1994) (explaining the deceptive nature in cigarette advertisements that associate youthful, healthy, and adventurous activity with smoking)).

<sup>61</sup> See Owen, *supra* note 22, at 745–46.

<sup>62</sup> See *id.* at 748–49.

<sup>63</sup> Cf. Owen, *supra* note 25, at 292. But see Vargo, *supra* note 32, at 553.

<sup>64</sup> See *supra* note 38 and accompanying text. But see Vandall, *supra* note 38, at 802–04 (1998) (arguing that section 2(b) of the *Restatement (Third)* does not apply traditional negligence, but rather “radical negligence,” because of the requirement of proving a reasonable alternative design); Vandall, *supra* note 18, at 174–76 (stating that the overwhelming majority of jurisdictions have rejected the requirement of proving a reasonable alternative design); Vargo, *supra* note 32, at 536–37 (same). It is important to note that changes in the *Restatement (Third)*—the shift from strict liability to negligence and requiring proof of a reasonable alternative design—support the use of SJTs in design defect cases. See *infra* Part IV.A. However, in jurisdictions that do not follow the *Restatement (Third)*, the plaintiff is still required to substantially complete discovery and use expert witnesses in order to establish liability in design defect cases. See *supra* Part II.B (discussing plaintiff strategies in jurisdictions using the consumer expectations test). Thus, even in jurisdictions that do not follow the *Restatement (Third)* design defect cases are well suited for SJTs because they are in a trial-ready posture (i.e., discovery basically must be completed before settlement becomes feasible). Moreover, design defect cases are well suited for SJTs in jurisdictions that do not

Moreover, under the risk-utility and consumer expectations tests, discovery basically must be completed in order to obtain evidence sufficient to establish liability. In the risk-utility analysis, complete discovery of the manufacturer's design process must be explored to determine if a safer alternative design could have been chosen.<sup>65</sup> In the consumer expectations analysis, complete discovery of the manufacturer's advertising and marketing techniques must be explored to determine whether consumers likely would be deceived into believing a product is safer than it actually is.<sup>66</sup> For these reasons, settlement prior to the completion of discovery is unlikely because the plaintiff has little bargaining power and risks conveying the perception of a weak case.<sup>67</sup>

Furthermore, the use of expert testimony in design defect cases cannot be underestimated.<sup>68</sup> Experts are used to aid the jury in determining whether a particular design is defective under both the risk-utility and consumer expectations tests.<sup>69</sup> In any given case, the testimony of plaintiff's and defendant's design experts can last two to three weeks at trial.<sup>70</sup> In addition, design defect cases typically involve expert testimony from physicians and psychologists in determining damages issues.<sup>71</sup> Testimony from physicians and psychologists can last several days.<sup>72</sup> Therefore, a substantial portion of trial costs in design defect cases can be

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follow the *Restatement (Third)* because substantial savings in expert fees and trial time can be realized. See *infra* Part IV.A.

<sup>65</sup> See *supra* notes 39–46 and accompanying text.

<sup>66</sup> See *supra* notes 54–56 and accompanying text.

<sup>67</sup> See HEAFEY & KENNEDY, *supra* note 2, § 13.05. However, if the defendant wishes to settle prior to plaintiff obtaining sufficient evidence to establish liability, settlement prior to completion of discovery is much more likely.

<sup>68</sup> See *supra* notes 50, 59–60 and accompanying text.

<sup>69</sup> See *supra* notes 50, 59–60 and accompanying text.

<sup>70</sup> See Telephone Interview with Robert M. Libbey, Attorney, Law Offices of Robert M. Libbey (Feb. 15, 1999). Robert M. Libbey has practiced personal injury law and handled design defect cases for over 30 years in Anchorage, Alaska. He currently practices law part-time while operating a wilderness lodge in central Alaska.

<sup>71</sup> See *id.*

<sup>72</sup> See *id.*

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attributed to expert testimony,<sup>73</sup> and the typical design defect trial can last a month or longer.<sup>74</sup>

### III. THE DEVELOPMENT, ADVANTAGES, AND DISADVANTAGES OF THE MANDATORY SUMMARY JURY TRIAL

“The summary jury trial (SJT) is a flexible, nonbinding ADR process designed to promote settlement in trial-ready cases headed for protracted jury trials.”<sup>75</sup> In the SJT, jurors are chosen from the regular pool of jurors and the attorneys for each party present a brief version of their case.<sup>76</sup> The SJT usually lasts one day, but flexibility in length is allowed to achieve a result most equivalent to an actual jury verdict.<sup>77</sup> The jury deliberates and returns a nonbinding verdict,<sup>78</sup> which the parties can use to discuss settlement negotiations at a post-SJT conference conducted by the court.<sup>79</sup>

#### *A. The Development of Federal Authority to Implement the Summary Jury Trial*

U.S. district court Judge Thomas Lambros created the SJT in 1980 while he presided over two personal injury trials that he thought should be settled without a full trial.<sup>80</sup> Judge Lambros believed that the barriers to settlement in these cases resulted from the parties emotionally needing

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<sup>73</sup> See *id.* On the average, expert trial testimony in design defect cases costs between \$25,000 and \$50,000 per case for plaintiffs. See *id.* Assuming the defendant uses expert testimony to rebut the plaintiff's experts, the trial testimony for defendants per case should be roughly the same.

<sup>74</sup> See *id.*

<sup>75</sup> PLAPINGER ET AL., *supra* note 7, reprinted in part in Elizabeth Plapinger et al., Center for Pub. Resources, *Judge's Deskbook on Court ADR*, 12 ALTERNATIVES TO HIGH COST LITIG. 9, 15 (1994).

<sup>76</sup> See Bobby Marzine Harges, *The Promise of the Mandatory Summary Jury Trial*, 63 TEMP. L. REV. 799, 803-04 (1990).

<sup>77</sup> See *id.* at 804 n.46.

<sup>78</sup> There is concern that summary jurors who are informed their verdict is only an advisory opinion will cut corners in deliberating a verdict in the interest of saving time. However, studies of mock jurors that have been informed of the hypothetical nature of their decision have revealed that mock jury verdicts remain highly predictive of actual trial verdicts. See *id.* at 809-10.

<sup>79</sup> See *id.* at 804.

<sup>80</sup> See LAMBROS, *supra* note 12, at iii-v.

their "day in court."<sup>81</sup> Moreover, he believed these barriers could be overcome if the parties had the opportunity to state their case and evaluate the jury's reaction to the conflicting evidence.<sup>82</sup> From these notions, Judge Lambros conceived of and used a summary trial for the second case, and it settled without a full trial.<sup>83</sup>

In creating the SJT, Judge Lambros derived authority from the Federal Rules of Civil Procedure. Specifically, he looked to Rule 1, which provides that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."<sup>84</sup> In addition, Lambros relied on Rule 16(a) concerning pretrial procedures.<sup>85</sup> Moreover, he relied on Rules 16(c)(7) and 16(c)(11), both of which encourage settlement through alternatives to trial.<sup>86</sup> Furthermore, Judge Lambros used Rule 39(c) as authority to impanel jurors in summary jury trials.<sup>87</sup> Finally, Judge Lambros justified the SJT by determining the process to be consistent with

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<sup>81</sup> *Id.* at 8.

<sup>82</sup> *See id.* Judge Lambros pondered a solution to the parties' resistance to settlement:

It occurred to me that if only the parties could gaze into a crystal ball and be able to predict, with a reasonable amount of certainty, what a jury would do in their respective cases, the parties and counsel would be more willing to reach a settlement rather than going through the expense and aggravation of a full jury trial.

*Id.* at iii. From this, Judge Lambros conceived of the notion of the SJT. *See id.*

<sup>83</sup> *See id.* at iv. The second case involved a products liability claim for a defective football helmet. *See id.*

<sup>84</sup> LAMBROS, *supra* note 12, at 10–11 (quoting FED. R. CIV. P. 1).

<sup>85</sup> *See id.* at 11. Rule 16(a) states: "In any action, the court may in its discretion direct the attorneys for the parties . . . to appear before it for a conference or conferences before trial for such purposes as (1) expediting the disposition of the action . . . and (5) facilitating the settlement of the case." FED. R. CIV. P. 16(a).

<sup>86</sup> Rules 16(c)(7) and 16(c)(11) provide that: "The participants at any conference under this rule may consider and take action with respect to . . . (7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute . . . and (11) such other matters as may aid in the disposition of the action." FED. R. CIV. P. 16(c)(7), (11).

<sup>87</sup> Rule 39(c) provides in pertinent part: "In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury . . . ." FED. R. CIV. P. 39(c). Although Rule 39 refers to "actions not triable of right by a jury," Judge Lambros found ample authority in this Rule to impanel jurors for summary jury trials. *See* LAMBROS, *supra* note 12, at 11. *But see* United States v. Exum, 748 F. Supp. 512, 513 (N.D. Ohio 1990); Hume v. M & C Management, 129 F.R.D. 506, 510 (N.D. Ohio 1990).

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### Rule 83.<sup>88</sup>

During the development of the SJT, the authority of federal judges to implement mandatory SJTs has been hotly debated primarily because prior to 1993, Rule 16 did not expressly provide federal courts with such authority.<sup>89</sup> The enactment of federal statutes and the amendment of the Federal Rules of Civil Procedure during the SJT's development have changed this debate greatly. First, the Civil Justice Reform Act of 1990 requires federal courts to implement a plan to reduce the expense and delay of civil justice.<sup>90</sup> The Act specifically mentions the use of SJTs as an ADR option to reduce the cost and delay of civil justice.<sup>91</sup>

More importantly, Rule 16(c)(9) was amended in December 1993 to implicitly grant federal courts authority to implement SJTs.<sup>92</sup> The Advisory

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<sup>88</sup> See LAMBROS, *supra* note 12, at 11. Rule 83 provided: "In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules . . . ." FED. R. CIV. P. 83 (amended 1995).

<sup>89</sup> See *Strandell v. Jackson County, Ill.*, 838 F.2d 884, 886-87 (7th Cir. 1987) (rejecting the notion of mandatory SJT in federal court because no expressed authority existed under Rule 16); see also *In re NLO, Inc.*, 5 F.3d 154, 157-58 (6th Cir. 1993) (same).

<sup>90</sup> See Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471, 471 note, 472-482 (1994 & Supp. III 1997).

<sup>91</sup> See *id.* § 473(a)(6)(B).

<sup>92</sup> Prior to the 1993 amendment, Rule 16(c) provided in pertinent part:

(c) Subjects to be Discussed at Pretrial Conferences. The Participants at any conference under this rule may consider and take action with respect to

....

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

....

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in disposition of the action.

FED. R. CIV. P. 16(c) (amended 1993); see also *Montgomery v. Louis Trauth Dairy, Inc.*, 164 F.R.D. 469, 470 n.2 (S.D. Ohio 1996) (quoting FED. R. CIV. P. 16 prior to the 1993 amendment).

Rule 16(c)(9) as amended states: "(c) Subjects for Consideration at Pretrial Conferences. At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to . . . (9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or local rule." FED. R. CIV. P. 16(c)(9). In contrast to the old Rule, the amended Rule

Committee Notes to the 1993 amendment indicate that Rule 16(c)(9) as amended provides federal courts with the authority to implement mandatory SJTs, by explaining:

Paragraph (9) is revised to describe more accurately the various procedures that, in addition to traditional settlement conferences, may be helpful in settling litigation. Even if a case cannot immediately be settled, the judge and attorneys can explore possible use of alternative procedures such as mini-trials, *summary jury trials*, mediation, neutral evaluation, and non-binding arbitration that can lead to consensual resolution of the dispute without a full trial on the merits. *The rule acknowledges the presence of statutes and local rules or plans that may authorize use of some of these procedures even when not agreed to by the parties.*<sup>93</sup>

Thus, the drafters specifically state that federal courts have the authority to order SJTs when authorized by statutes or local rules<sup>94</sup> even without the consent of the parties.<sup>95</sup>

#### B. Commonly Cited Advantages of Using the Summary Jury Trial

There are a number of advantages to using SJTs. One of the most commonly cited advantages stems from the SJT procedure itself, as the process usually lasts no more than a day, saving endless days of trial, witness fees, and court costs when used in cases lasting more than a few days.<sup>96</sup> Additionally, pretrial settlement is promoted because the parties have the opportunity to evaluate the jury's reaction to conflicting evidence in the case and thus can assess the strengths and weaknesses of their respective positions.<sup>97</sup>

Furthermore, because SJT can condense a potentially lengthy trial into a one-day event, it is a way to keep caseloads in federal district court at a

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expressly provides that "the court *may take appropriate action . . . when authorized by statute or local rule*" in presiding over pretrial conferences. *Id.* (emphasis added); see also *Montgomery*, 164 F.R.D. at 470.

<sup>93</sup> FED. R. CIV. P. 16(c)(9) advisory committee's note (emphasis added).

<sup>94</sup> For an example of a local rule expressly providing for the use of mandatory SJT, see *Montgomery*, 164 F.R.D. at 471 n.4 (quoting S.D. OHIO LOCAL R. 53.1 (providing for mandatory SJT)).

<sup>95</sup> See *id.*

<sup>96</sup> See Harges, *supra* note 76, at 805-06.

<sup>97</sup> See Thomas D. Lambros, *The Federal Rules of Civil Procedure: A New Adversarial Model for a New Era*, 50 U. PITT. L. REV. 789, 799 (1989).



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manageable level.<sup>98</sup> For example, Judge Arthur Spiegel of the United States District Court for the Southern District of Ohio explained that if 1,000 cases are filed in a given district in one year, ninety-five percent or 950 cases generally settle before trial while five percent or fifty cases go to trial.<sup>99</sup> Thus, fifty trials must be conducted in this district in one year.<sup>100</sup> Judge Spiegel further explained that there are approximately 200 active trial days in a given year; thus, if each trial requires a week or more, it is impossible to dispose of fifty cases in a year.<sup>101</sup> Moreover, when the objective is to dispose of cases within fifteen months after they have been filed, "it [becomes] obvious that a trial which may last for several weeks or more can really upset . . . [the] plan of case disposition."<sup>102</sup> In light of this, where use of the SJT promotes settlement, the one-day process provides the court with flexibility to devote attention to and dispose of more cases in a given year.

Finally, another advantage of the SJT is that it allows each party to "have their day in court."<sup>103</sup> In this sense, the parties must confront the opposing position and rationally rebut the arguments of that position while emotionally processing the effect of those arguments on the jury.<sup>104</sup> This process may raise anxiety levels because the strength of each party's position will "either be confirmed or totally undermined by the verdict. The verdict is the considered judgment of . . . impartial citizens selected in the same fashion as a real jury."<sup>105</sup> Regardless of the outcome, the process is psychologically "satisfying to the parties—primarily because of their faith in the fairness of the jury system."<sup>106</sup>

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<sup>98</sup> See Harges, *supra* note 76, at 805–06.

<sup>99</sup> See Arthur Spiegel, *Summary Jury Trials*, 54 U. CIN. L. REV. 829, 832 (1986).

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> *Id.*

<sup>103</sup> LAMBROS, *supra* note 12, at 8.

<sup>104</sup> See Ann E. Woodley, *Strengthening the Summary Jury Trial: A Proposal to Increase Its Effectiveness and Encourage Uniformity in Its Use*, 12 OHIO ST. J. ON DISP. RESOL. 541, 562–63 (1997).

<sup>105</sup> *Id.* at 563.

<sup>106</sup> *Id.*

*C. Commonly Cited Disadvantages of Using the Summary Jury Trial*

There are open criticisms<sup>107</sup> and a few commonly cited disadvantages of SJTs. One of the most frequently cited is the inability of a summary jury to assess the credibility of witnesses because all evidence typically is presented through the parties' attorneys.<sup>108</sup> Thus, critics assert that the utility of the SJT is limited where a case turns on the credibility of witnesses, because the summary jury will only judge the credibility of each party's lawyer.<sup>109</sup> However, "[a] review of the verdicts in cases that have gone to trial after the summary jury trial . . . supports the contention that the summary jury trial is a reliable predictor of a verdict following a full trial where the jury had the opportunity to judge witness credibility."<sup>110</sup> Furthermore, where the case revolves around witness credibility, the court can adjust the SJT process to provide for the limited testimony and cross-examination of key witnesses.<sup>111</sup>

Another commonly cited disadvantage is the expense incurred if the case fails to settle after the SJT and proceeds to full trial.<sup>112</sup> Although SJT is far less expensive than a full trial because it is conducted in one day, it is still a labor-intensive process that consumes time and money. Thus, the argument is that if the case is going to proceed to full trial anyway, time and money could be saved by not participating in the SJT. However, as a way of assisting litigants in recouping expenses associated with participating in SJTs, courts usually schedule the full trial within thirty days after the SJT.<sup>113</sup> This reduces costs to parties participating in the SJT by eliminating the duplication of "full preparation for both summary jury trial and a trial on the merits."<sup>114</sup> Furthermore, even if the SJT does not succeed in promoting settlement of the case, "the value of the summary jury trial in crystalizing the issues and the proof is immeasurable to the later binding trial, to which all parties come more fully prepared and rehearsed in their

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<sup>107</sup> See generally Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986).

<sup>108</sup> See Harges, *supra* note 76, at 807.

<sup>109</sup> See *id.*

<sup>110</sup> *Id.*

<sup>111</sup> See *id.* at 807.

<sup>112</sup> See *id.*

<sup>113</sup> See *id.* at 804, 807.

<sup>114</sup> *Id.* at 804.

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roles and the trial procedure.”<sup>115</sup> Overall, even if it does not result in settlement, the SJT can be beneficial for trial preparation.

### IV. THE USE OF MANDATORY SUMMARY JURY TRIALS IN DESIGN DEFECT CASES

#### A. *Characteristics of Design Defect Cases Making Them Well Suited for Mandatory Summary Jury Trials*

There are several reasons design defect cases are suitable for mandatory SJTs. As an initial matter, the parties in a design defect case are unlikely to suggest SJT or any other settlement technique because of the fear that this will portray a case weakness.<sup>116</sup> Thus, settlement methods that are court-ordered rather than party-initiated are most useful in design defect cases.<sup>117</sup> There are several characteristics of design defect cases that make them well suited for mandatory SJTs. First, the *Restatement (Third)* provides that liability is based on negligence and proof of a reasonable alternative design, making design defect cases well suited for SJTs because the jury decides the key issues involved. Second, discovery is substantially completed before settlement is feasible in design defect cases, making their posture ideal for the SJT. Third, significant trial costs are attributed to expert witnesses and trials can last a month or longer in design defect cases, making them well suited for the one day SJT procedure where substantial savings in trial time and expert fees can be realized.

First, the *Restatement (Third) of Torts* provides that liability is based on negligence and proof of a reasonable alternative design,<sup>118</sup> making design defect cases well suited for SJTs because the jury decides the key issues involved. Under the *Restatement (Third)*, the jury must determine whether a reasonable person could conclude that the manufacturer could have

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<sup>115</sup> *Arabian Am. Oil Co. v. Scarfone*, 119 F.R.D. 448, 449 (M.D. Fla. 1988); see also *Federal Reserve Bank v. Carey-Canada*, 123 F.R.D. 603, 607 (D. Minn. 1988).

<sup>116</sup> See HEAFEY & KENNEDY, *supra* note 2, § 13.05 (explaining that parties rarely initiate settlement proceedings in products liability cases).

<sup>117</sup> See *id.* Note, if one or both of the parties suggest the use of SJT in a defective product case, this is another way to implement the process, but this is unlikely in any products liability case. See *id.*

<sup>118</sup> See *supra* notes 28, 36–38 and accompanying text.

chosen a safer alternative design.<sup>119</sup> Thus, the issues of negligence and the existence of a reasonable alternative design are for the jury to decide.<sup>120</sup>

Moreover, Judge Thomas Lambros indicated that design defect cases are appropriate for SJTs when he explained:

There is a certain class of cases in which the only bar to settlement among parties is the difference in opinion of how a jury will perceive evidence adduced at trial. These cases involve issues, like that of "the reasonable man" in negligence litigation, where no amount of jurisprudential refinement and clarification of the applicable law can aid in resolution of the case. In these cases, settlement negotiations must often involve an analysis of similar jury trials within the experience of counsel and the trial judge as to the findings of liability and damage.<sup>121</sup>

Thus, design defect cases are well suited for the SJT because the key issues, negligence and existence of a safer alternative design, are issues decided by the jury. Moreover, the SJT allows the parties to obtain an actual jury's perception of their case.<sup>122</sup> This jury perception can be very persuasive and thus promote settlement in cases where parties "have a good-faith difference in their evaluations of the case."<sup>123</sup>

Second, because discovery basically is completed before settlement is feasible in design defect cases, their posture is ideal for the SJT. "For SJT to be truly beneficial, the case must substantially be in a posture for trial. Discovery must be complete and there must be no motions pending."<sup>124</sup>

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<sup>119</sup> "More specifically, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design . . . rendered the product not reasonably safe." RESTATEMENT (THIRD) OF TORTS § 2 cmt. d (1998).

<sup>120</sup> See *id.* § 2 cmt. f ("The necessity of proving a reasonable alternative design as a predicate for establishing design defect is . . . addressed initially to the courts. . . . Assuming that a court concludes that sufficient evidence on this issue has been presented, the issue is then for the trier of fact.").

<sup>121</sup> LAMBROS, *supra* note 12, app. A at 1; see also Woodley, *supra* note 104, at 610 (stating that SJTs are appropriate in cases where parties disagree as to how a jury will decide the key issues of a case).

<sup>122</sup> See LAMBROS, *supra* note 12, at 10.

<sup>123</sup> Alexander B. Denson, *The Summary Jury Trial: A Proposal from the Bench*, 1995 J. DISP. RESOL. 303, 306 (1995) (stating that such cases are appropriate for SJTs).

<sup>124</sup> LAMBROS, *supra* note 12, at 12; see also Woodley, *supra* note 104, at 610 ("Discovery must be complete and the case must be ready for trial prior to the commencement of the summary jury trial."). Judge Lambros's justification for this is

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Under the risk-utility and consumer expectations tests, discovery basically must be completed in order to obtain evidence sufficient to establish liability.<sup>125</sup> For this reason, settlement prior to completion of discovery is unlikely because the plaintiff has little bargaining power and risks conveying the perception of a weak case.<sup>126</sup> Therefore, because discovery is completed before settlement becomes feasible, design defect cases are in a trial-ready posture, making them well suited for the SJT procedure.<sup>127</sup>

Third, significant trial costs are attributed to expert witnesses<sup>128</sup> and trials can last a month or longer in design defect cases,<sup>129</sup> making them well suited for the one-day SJT procedure where substantial savings in expert fees and trial time can be realized.<sup>130</sup> Moreover, savings are realized by the parties and by the court. For the parties, expert witness fees are reduced<sup>131</sup> because the number of experts and length of their testimony is

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based on the reasoning that evidence rulings can be determined more accurately for cases where discovery is substantially complete. Thus, only admissible evidence will be presented at the SJT. *See* LAMBROS, *supra* note 12, at 12.

<sup>125</sup> *See supra* Parts II.A.2, II.B.

<sup>126</sup> *See* HEAFEY & KENNEDY, *supra* note 2, § 13.05. However, if the defendant wishes to settle, settlement prior to completion of discovery is much more likely.

<sup>127</sup> *Cf.* LAMBROS, *supra* note 12, at 12.

<sup>128</sup> *See supra* Part II.C.

<sup>129</sup> *See id.*

<sup>130</sup> *See* Woodley, *supra* note 104, at 610 (stating that SJTs are appropriate in cases where “the trial will consume significant resources (e.g., high expert costs, take longer than a week to try, etc.)”); *see also* PLAPINGER ET AL., *supra* note 7, reprinted in part in Elizabeth Plapinger et al., Center for Pub. Resources, *Judge’s Deskbook on Court ADR*, 12 ALTERNATIVES TO HIGH COST LITIG. 9, 14 (1994) (stating that “cases headed for a jury trial of over five days” are appropriate for SJTs).

<sup>131</sup> One study of mandatory SJTs found that billable attorney hours remained the same or increased for attorneys using SJTs because of the extensive post-SJT settlement negotiations that took place. *See* James Alfini, *Summary Jury Trials in State and Federal Courts: A Comparative Analysis of the Perceptions of Participating Lawyers*, 4 OHIO ST. J. ON DISP. RESOL. 213, 231–32 (1989). However, even if attorney fees remain the same or increase slightly due to post-SJT settlement negotiations, the parties would still realize significant savings in expert witness fees. *See* Telephone Interview with Robert M. Libbey, Attorney, Law Offices of Robert M. Libbey (Feb. 15, 1999) (explaining that on the average, expert trial testimony in design defect cases costs between \$25,000 and \$50,000 per case for plaintiffs). Assuming the defendant uses expert testimony to rebut the plaintiff’s experts, the trial testimony for defendants per case should be roughly the same.

significantly reduced.<sup>132</sup> For the court, savings are realized where the SJT promotes settlement because the one-day process provides the court with flexibility to devote attention to and dispose of more cases in a given year.<sup>133</sup> Thus, design defect cases are well suited for SJTs because the parties and the court realize substantial savings.

### *B. Recommendations for Mandatory Summary Jury Trial Procedures in Design Defect Cases*

Although federal courts have the authority to compel parties to participate in SJTs, they also have the discretion to tailor the procedures to each case.<sup>134</sup> Flexibility in the SJT procedure is a key factor to its successful use.<sup>135</sup> Therefore, certain recommendations should be considered when using mandatory SJTs in design defect cases. First, courts should provide for the use of expert witnesses in SJT proceedings. Second, courts should conduct a pre-SJT conference to rule on all evidentiary issues prior to the SJT. Third, courts should establish that SJT proceedings are closed to the public and cannot be used in a trial on the merits.

First, courts should provide for the use of expert witnesses in SJT proceedings because design defect cases rely heavily on expert testimony.<sup>136</sup> Specifically, SJT proceedings should allow testimony from plaintiff's design expert and defendant's design expert.<sup>137</sup> However, the number of experts used and the extent of their testimony should be limited<sup>138</sup> because the length of the SJT normally does not exceed one

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<sup>132</sup> Significant trial costs are attributed to expert fees in design defect cases because of the number of experts used and the length of their testimony. *See supra* Part II.C. The SJT provides for the testimony of experts in design defect cases, but limits the number of experts who can testify and the length of their testimony based on the one-day procedure. *See infra* notes 136–40 and accompanying text.

<sup>133</sup> *See supra* notes 96–102 and accompanying text (regarding Judge Spiegel's discussion).

<sup>134</sup> *See* FED. R. CIV. P. 16(c)(9) (providing federal courts with broad discretion when considering special procedures for settlement).

<sup>135</sup> *See* Harges, *supra* note 76, at 806.

<sup>136</sup> *See supra* Parts II.B, II.C.

<sup>137</sup> *See* Woodley, *supra* note 104, at 612 (providing a model SJT procedure that allows the use of witnesses in cases that turn on witness credibility).

<sup>138</sup> *See id.* Woodley's model SJT procedure provides for "a short, narrative statement by one or more live witnesses." *Id.*

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day.<sup>139</sup> Furthermore, consistent with the length of the SJT, a short direct examination and cross-examination should be allowed to provide the jury with a basis for judging witness credibility.<sup>140</sup>

Second, courts should conduct a pre-SJT conference to rule on all evidentiary issues prior to the SJT.<sup>141</sup> This ensures that only admissible evidence will be presented at the SJT, thus making the SJT verdict more predictive of an actual verdict rendered from a full trial on the merits.<sup>142</sup> In addition, the pre-SJT conference reduces the need for objections that would tend to prolong a one-day SJT proceeding.<sup>143</sup>

Third, in the interest of promoting settlement through SJTs, courts should establish that SJTs are closed to the public where either party has an interest in keeping the proceeding private. Furthermore, courts should establish that any part of the SJT proceeding cannot be used in a trial on the merits. The Supreme Court has held that the analysis for a First Amendment claim of access to judicial proceedings involves a two-part test.<sup>144</sup> First, the judicial proceeding must be one that historically has been open to the public and the press.<sup>145</sup> Second, general public access must play a "significant positive role in the functioning of the [judicial] process in question."<sup>146</sup> Under this analysis, the Sixth Circuit in *Cincinnati Gas & Electric Co. v. General Electric Co.* held that there is no First Amendment right to SJT proceedings.<sup>147</sup> The court in *Cincinnati Gas* found that the SJT is a settlement technique,<sup>148</sup> and settlement techniques historically have been closed to the public.<sup>149</sup> Furthermore, where a party has a legitimate

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<sup>139</sup> See *id.* at 611. The model procedure states that the court can extend the SJT to two days in some cases. See *id.*

<sup>140</sup> See *id.* at 612. The model procedure provides for "a limited direct examination (e.g., 10 minutes) and cross-examination (e.g., 15 minutes) . . . ." *Id.*

<sup>141</sup> See LAMBROS, *supra* note 12, at 12; Denson, *supra* note 123, at 307; Woodley, *supra* note 104, at 612.

<sup>142</sup> See LAMBROS, *supra* note 12, at 12.

<sup>143</sup> Woodley provides in her model SJT procedure that: "Objections by counsel during the summary jury trial are discouraged, but will be allowed if opposing counsel clearly violates rules" of evidence. Woodley, *supra* note 104, at 612.

<sup>144</sup> See *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 7-8 (1986).

<sup>145</sup> See *id.*

<sup>146</sup> *Id.* (citation omitted).

<sup>147</sup> See *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 904-05 (6th Cir. 1988).

<sup>148</sup> See *id.* at 903-04.

<sup>149</sup> See *id.* (citing *Palmieri v. New York*, 779 F.2d 861, 865 (2d Cir. 1985)).

interest in keeping the SJT confidential, the court found that allowing public access would be detrimental to the promotion of settlement and thus would not play a "significant positive role in the functioning of the process . . . ."<sup>150</sup> Thus, in the interest of promoting settlement, courts should establish, as did *Cincinnati Gas*, that SJTs are closed to the public where either party objects to public access.

Finally, courts should firmly establish that "neither the jury findings nor any statement of counsel during the summary jury trial are admissible on the trial on the merits or may be construed as judicial admissions."<sup>151</sup> The court in *Russell v. PPG Industries, Inc.* explained the reasoning behind this principle in stating: "Were we to allow parties to offer information from the summary jury trial to this [trial on the merits, the SJT's] utility as a settlement device would be significantly undermined and parties' willingness to participate in the process [would be] substantially decreased."<sup>152</sup> Therefore, in establishing that SJT proceedings cannot be used in a full trial on the merits, courts promote settlement by encouraging full, risk-free participation by the parties.<sup>153</sup>

## V. CONCLUSION

In conclusion, because of the characteristics of design defect cases, federal courts should use mandatory SJTs to promote settlement of design defect cases bound for trial. This Note focused on federal use of SJTs because federal courts have the authority to implement SJTs. However, where state courts have the authority to implement SJTs, they also should use such proceedings to promote settlement in design defect cases.

The SJT is an efficient and effective proceeding that enables judges to better manage the number of cases filed in court.<sup>154</sup> Chief Justice Warren Burger referred to judges using SJTs as "judicial pioneers [who] should be commended for their innovative programs. We need more of them in the

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<sup>150</sup> *Id.* (quoting *Press Enter.*, 478 U.S. at 8).

<sup>151</sup> Spiegel, *supra* note 97, at 831.

<sup>152</sup> *Russell v. PPG Indus., Inc.*, 953 F.2d 326, 334 (7th Cir. 1992) (citing FED. R. EVID. 408).

<sup>153</sup> *See id.* ("The purpose of the summary jury trial is 'to motivate litigants toward settlement . . . .' The device is 'designed to provide a "no risk" method by which the parties may obtain the perception of six jurors . . . .'" (citations omitted).

<sup>154</sup> *See* Thomas D. Lambros, *The Summary Jury Trial: An Effective Aid to Settlement*, 77 JUDICATURE 6, 6-7 (1993).



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future.”<sup>155</sup> Judge Thomas Lambros summed up nicely by explaining: “We have begun a new era in our adversarial process with the evolution of new models of advocacy. The summary jury trial is an integral part of this evolution, earning its status as a vital part of the American adversarial system.”<sup>156</sup>

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<sup>155</sup> *Id.* at 8, 12 (quoting FEDERAL JUDICIAL CTR., ALTERNATIVE METHODS FOR PROMOTING SETTLEMENTS: SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT COURT JUDGES 43 (1986) (quoting WARREN BURGER, YEAR-END REPORT ON THE JUDICIARY (1984))).

<sup>156</sup> *Id.* at 12.

